No. 20,844

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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DARRELL ZWANG and ELODYMAE ZWANG,

APPELLANTS

v.

STEWART L. UDALL, as SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

---

# BRIEF FOR THE APPELLEE

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## OPINION BELOW

The district court's memorandum opinion is set out at pages 42-51 of the record.

## JURISDICTION

Jurisdiction and venue of the district court were invoked by the appellants under 28 U.S.C. secs. 1331, 1346(a)(2) and 1391(e). Judgment of the district court was entered on

February 23, 1966 (R. 57). Notice of appeal was filed on March 2, 1966 (R. 59). This Court's jurisdiction rests on 28 U.S.C. sec. 1291.

## QUESTION PRESENTED

Whether the district court correctly held it was without jurisdiction to determine whether a protest was pending within the meaning of 43 U.S.C. sec. 1165 and that this was a matter exclusively delegated to the Secretary of the Interior for determination.

## STATUTE INVOLVED

43 U.S.C. sec. 1165 provides in pertinent part:

> That after the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under the Act of March 3, 1891, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; * * *.

## STATEMENT

This action in the nature of mandamus was instituted to compel the Secretary of the Interior to issue patents to

:he appellants for entries made under the Desert Land Entry ıct, 43 U.S.C. secs. 321 et seq., in addition to lands for ;hich appellants will receive patents. 43 U.S.C. sec. 1165 ›rovides for the issuance of patents if no protest or contest :s pending after the passage of two years from the date of is-;uance of the receipt of final proof. Appellants maintained :hat no contest or protests had been made and that they, as a ıatter of law, were entitled to patents. This case was sub-ıitted to the district court on memoranda and briefs (R. 53) ınd a pretrial conference order.

The undisputed facts, as contained in the Pretrial :onference Order (R. 20-22), are as follows:

> A. Desert land entries comprising 320 acres each in the N ½ and the S ½ Sec. 19, T. 4S., R. 16 E., S.B.M., an oversize section in Riverside County, California, were allowed January 6, 1955, and subsequently assigned to plaintiffs, the Zwangs, who are husband and wife.
>
> B. Final proofs were submitted on May 17, 1961. The register's receipt is dated May 29, 1961.
>
> C. By decision dated May 8, 1962, the Land Office at Riverside rejected the final proofs.

D. The Zwangs appealed to the Director, Bureau of Land Management.

E. On October 10, 1962, the Division of Appeals, Office of the Director, reversed the decision of the Land Office and remanded the cases to the Land Office for further consideration.

F. On April 3, 1963, the Land Office accepted the final proofs for 80 acres in each entry and cancelled the entries as to the remaining lands.

G. The decision of April 3, 1963, was made by the Land Office ex parte, without a hearing and without prior notice to the Zwangs. A hearing was not waived by the Zwangs. The decision of April 3, 1963, was made by the Land Office based upon the records and documents contained in its files.

H. The Zwangs appealed again to the Director, Bureau of Land Management, and requested a hearing. On October 23, 1963, the Division of Appeals, Office of the Director, denied the Zwangs' request for a hearing and modified and affirmed the decision of the Land Office.

I. The Zwangs then appealed to the Secretary of the Interior, who issued his decision on February 3, 1965.

J. At the time the Zwangs filed their complaint herein, no contest within the framework of 43 CFR 1852.2-2 had been filed. None has been filed since.

K. The Zwangs have not received patents for their entries.

L. The Zwangs' request for patents covering 320 acres on each entry was denied by the Land Office on March 5, 1965.

M. Stewart L. Udall is the Secretary of the Interior.

The district court, in its "Memorandum Opinion For Use in Preparation of Findings of Fact, Conclusions of Law and Judgment" (R. 42), after reciting the above facts then quoted the pertinent part of 43 U.S.C. sec. 1165 (Br. 2) as follows:

> * * * when there shall be no pending contest or protest against the validity of such entry * * *. [Emphasis ours.]

The district court reviewed the principal authorities submitted by briefs of counsel and concluded (R. 50-51):

> When the Lane case, supra, is read with the Champion Lumber Co. case, supra, it appears that the determination of whether a protest or contest has, in fact, been instituted, within the statutory period, lies within the discretion of the Secretary unless his conclusion can be said to be capricious or arbitrary or so unreasonable as not to be tenable. From the foregoing authorities, the court concludes that the determination of whether the action of the Secretary of April 3, 1963,

> amounts to a protest is for the Commissioner, under the supervision of the Secretary of the Interior, to decide and that this Court is without jurisdiction to determine whether the action of the Land Office on April 3, 1963, constituted a protest.

The district court, after finding that it lacked the jurisdiction in this case to determine whether a protest had been made, stated (R. 51):

> If, as contended by plaintiffs, this court has the jurisdiction to determine the question of whether the cancellation on April 3, 1963, of the entries involved, other than for the 80 acres approved, the court would conclude that the said action, from which plaintiffs appealed, was a "protest" within the meaning of Section 1165 and that the Government is not required to file a "contest" as provided for in 43 C.F.R. §1852.2-2 to stop the running of the two year period concerned.

This appeal followed (R. 59).

## SUMMARY OF ARGUMENT

### I

The district court has no jurisdiction to review a determination of the Bureau of Land Management that a protest was pending within the meaning of 43 U.S.C. sec. 1165. Congress has charged the Secretary of the Interior with the responsibility for the administration and disposition of public lands.

The Secretary of the Interior has been given the exclusive jurisdiction to determine whether a protest has been raised within the meaning of 43 U.S.C. sec. 1165.

The Land Office Manager's decision, dated April 3, 1963, is a protest within the meaning of 43 U.S.C. 1165. The Supreme Court, in Lane v. Hoglund, 244 U.S. 174 (1917), has considered the question as to what is, and who may institute, a protest. The action taken by the Land Office Manager, a "public agent," in rejecting the submitted final proofs clearly is a "proceeding in the public right against an existing entry," Lane v. Hoglund, 244 U.S. 174, p. 178, which would have taken out of operation the subject statute.

If the courts have jurisdiction over this matter, then the appellants must first have exhausted their administrative remedies to invoke that jurisdiction.

The decision of the Land Office has not been shown to be arbitrary or capricious in the sense that the courts would have a limited jurisdiction to review it.

The appellants have not timely raised their claim to patents under 43 U.S.C. sec. 1165. The failure of the

appellants to appeal from the Land Office Manager's rejection of their demand for patents to the Director of the Bureau of Land Management and the Secretary precludes them from raising for the first time in the courts the rejection of their demand for the issuance of patents under 43 U.S.C. sec. 1165. This attempt of the appellants to raise in the courts the denial by the Land Office Manager of the demand for patents is nothing but an attempt to bypass the Director of the Bureau of Land Management and the Secretary of the Interior, who have often been designated by the courts as a "special tribunal" on public land matters.

## ARGUMENT

### I

### THE DISTRICT COURT HAS NO JURISDICTION TO REVIEW A DETERMINATION OF THE BUREAU OF LAND MANAGEMENT THAT A PROTEST WAS PENDING WITHIN THE MEANING OF 43 U.S.C. SEC. 1165

A. The Secretary of the Interior has been charged by Congress with the responsibility for the administration and disposition of public lands. - The Secretary of the Interior has been "charged with the supervision of public business

relating to * * *. The public lands, * * *." R.S. sec. 441; 5 U.S.C. sec. 485. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is directed to "perform all executive duties * * * in anywise respecting * * * public lands and the issuing of patents * * *." R.S. sec. 453; 43 U.S.C. sec. 2. He is expressly "authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of * * * [the Title dealing with public lands] not otherwise provided for." R.S. sec. 2478; 43 U.S.C. sec. 1201.

The Supreme Court, in Cameron v. United States, 252 U.S. 450 (1920), at pages 459-460 stated the proposition that:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; United States v. Schurz, 102 U.S. 378, 395; Lee v. Johnson, 116 U.S. 48, 52; Knight v. United States Land Association, 142 U.S. 161, 177, 181; Riverside Oil Co. v. Hitchcock, 190 U.S. 316.

See also Best v. Humboldt Mining Co., 371 U.S. 334, 337 (1963).

The authority given the Secretary of the Interior to supervise the administration and disposal of the public lands of the United States is quasi-judicial, and may not be interfered with through mandamus or injunction processes unless his conclusions can be said to be arbitrary or capricious. United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); United States ex rel. McBride v. Schurz, 102 U.S. 378 (1880); Brown v. Hitchcock, 173 U.S. 473 (1899); United States ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549 (1919); United States ex rel. Hall v. Payne, 254 U.S. 343 (1920).

B. The Secretary of the Interior has exclusive jurisdiction to determine whether a protest has been raised within the meaning of 43 U.S.C. sec. 1165. - "So long as the legal title remains in the Government all questions of right should be solved by appeal to the land department and not to the courts." Brown v. Hitchcock, 173 U.S. 473, 477 (1899); Best v. Humboldt Mining Co., 371 U.S. 334, 338 (1963). This Court has long recognized the limited function of the courts

in matters involving public lands. In Standard Oil Co. of California v. United States, 107 F.2d 402, 409 (1940), cert. den., 309 U.S. 654, this Court stated:

> The disposal of the public lands is not a subject over which the "judicial power" of the United States is extended. It is a field in which the authority of the Congress is supreme. Lee v. Johnson, 116 U.S. 48, 6 S.Ct. 249, 29 L.Ed. 570; Art. IV, sec. 3, clause 2, of the Constitution, U.S.C.A.

In Champion Lumber Co. v. Fisher, 227 U.S. 445 (1913), a proceeding in mandamus to compel the Secretary of the Interior to issue a patent, when the dispute concerned the same issue as here--whether there had been a "protest" within the meaning of the two-year statute--the Supreme Court, in denying the petition for allowance of writ of error for lack of jurisdiction under Section 250 of the Judicial Code, took occasion to quote in part with apparent approval from the appellate court opinion (227 U.S. 448-449):

> "Every point advanced by appellant in this case is, in our view, settled by the following very recent decisions: Fisher v. Grand Rapids Timber Co., 37 App.D.C. 436; Ness v. Fisher, 223 U.S. 683; McKensie v. Fisher, 39 App.D.C. 7. In

Fisher v. Grand Rapids Timber Co., which involved the interpretation of the very statute upon which appellant here relies, this court, speaking through Mr. Justice Van Orsdel said: 'While it is true that arbitrary power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communication and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the Commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided by law to his discretion and judgment. This proceeding will not admit of such a review.'

"The communications of Special Agent Hammer respecting this entry were made within the two years contemplated by said act of March 3, 1891, as was the communication of June 18, 1904, from the Commissioner to said agent. It is apparent that these communications resulted in the withholding of a patent; in other words, that the Commissioner regarded the right to that patent as dependent upon the outcome of the investigation which was to ensue. The subsequent decision of the Secretary that what was done within the two-year period constituted a protest against the patenting of the entry, was not arbitrary or capricious, but was based upon evidence; and the sufficiency of that evidence was for his and not our determination."

The portion of the decision quoted by the Supreme Court clearly sets forth the legal principle which is involved in this appeal and concludes that this is "a matter exclusively confided by law to his [the Secretary's] discretion and judgment."

Appellants' argument that the Champion case by implication is overruled by Lane v. Hoglund, 244 U.S. 174 (1917), overlooks the difference in facts of the two cases noted by the district court (R. 50).[1/] In the Lane case, no proceeding was begun within the two-year period, leaving no room for the exercise of judgment on the part of the Secretary. In the Champion case, within the two-year period proceedings had been instituted looking to an investigation of an alleged fraud.

C. The decision of the Land Office Manager, dated April 3, 1963, is a protest within the meaning of 43 U.S.C. sec. 1165. - Final proofs were submitted by the appellants on

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1/ Of course, overruling of a unanimous decision directed solely at this one issue, sub silentio in an opinion four years later, is not to be assumed.

May 17, 1961. The register's receipt is dated May 29, 1961, from which the two-year period must run. The Land Office, Riverside, California, by decision dated May 8, 1962 (R. 26-A), rejected the final proofs and cancelled the entries in their entirety, because the proofs submitted showed that the reclamation of the lands entered had not been accomplished during the statutory life of the entries. That decision, on appeal, was reversed and the cases remanded by the office of the Director of the Bureau of Land Management, for further consideration in light of additional information furnished by the appellants (R. 26-D). A further decision was then issued by the Land Office, dated April 3, 1963 (R. 26-C), accepting the final proofs as to 80 acres of land in each entry and rejecting the proofs and cancelling the entries as to the remaining lands therein.[2/] That decision, on appeal, was sustained as modified by the office of the Director of the Bureau of Land Management (R. 26-H). The Assistant Solicitor, Land Appeals, office of the Secretary, by decision dated February 3,

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2/ There is no dispute in this case concerning the two 80-acre tracts.

1965 (R. 26-J), set aside the Land Office and Director's decisions and remanded the cases to the Land Office for the institution of contest proceedings "at which expert testimony and other evidence can be submitted and subjected to cross-examination and rebuttal" (R. 26-M), to resolve the factual dispute. Both of the Land Office decisions rejecting the final proofs and cancelling in part the entries were issued prior to the expiration of two years from the date final receipts had been issued.

The appellants here have overlooked the concise language in the opinion written by Mr. Justice Van Devanter in Lane v. Hoglund, 244 U.S. 174 (1917), where the question as to what constitutes a contest and a protest and by whom they may be instituted is considered. The Court there stated (pp. 178-179):

> As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant conducted in his own interest against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether

> by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry. This explains the use in the statute of both terms in the disjunctive, and accords with the instructions of May 8, 1891, 12 L.D. 450, wherein each term is spoken of as meaning a "proceeding" under the Rules of Practice to cancel or defeat an entry, and wherein it is said that "when there are no proceedings initiated within that time [the two years] by the government or individuals the entryman shall be entitled to patent." The same view is shown in the supplemental instructions of July 1, 1891, 13 L.D. 1, wherein the Secretary said to the Commissioner: "You will, therefore, approve for patent all entries against which no proceedings have been, or shall be, begun within the specified period, the entry will be held to have been taken out of the operation of this statute, and such cases will proceed to final judgment as heretofore."

After discussing departmental decisions and the facts of the case before it, the opinion continued (p. 181):

> Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years

> have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course.

It is clear in the present instance that protests had been instituted against the subject entries within two years of proofs of final submission and in fact are still pending. There is no requirement in the statute that the protests or contests be valid or upheld to toll the statute.

It is true that technical contest proceedings which have been ordered by the Secretary within the purview of the departmental regulations have not yet been initiated against the entries in question. This is immaterial here since the entries have been under official challenge since May 8, 1962, and the statute is inapplicable.

Contrary to appellants' assertion that there is no provision in the regulations for a government protest (Br. 10) 43 C.F.R. sec. 1852.1-2, entitled "Protests," provides as fol lows:

> Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

This provision certainly encompasses the objections raised by the two decisions of the Land Office and is consistent with the quoted portion of Lane v. Hoglund, supra. The Government does not have to initiate a formal contest as to a record matter. The decisions of May 8, 1962, and April 3, 1963, wer both stated to be based upon facts apparent from the final proofs submitted by the appellants. These decisions in no wise were based on information obtained from field examinatio or conflicting factual evidence. The fact that the April 3, 1963, decision was not issued pursuant to information obtaine from field examinations was clearly recognized by the Department of the Interior in its February 3, 1965, decision (A-302

(R. 26-M). A notice and hearing, therefore, were not thought to be required in connection with the decisions of the Land Office. Contests are instituted and hearings held normally where factual matters are contested. In the Land Office decisions no facts were considered to be contested. The fact that the Secretary remanded these cases for the instituting of a contest only shows that the Secretary considered that there was a factual dispute needing to be resolved. In this case, by service of the adverse decisions of the Land Office the appellants were notified of the protest to their entries which preclude 43 U.S.C. sec. 1165 from operating so as to entitle the appellants to a patent. Whether the action taken was valid or not it was a protest and tolled the statute.

The district court recognized that if the Government could not rely on "protest" as distinguished from "contest," as treated in 43 C.F.R. sec. 1852.1-3, then the appellants' contentions would be correct (R. 45). The district court, however, concluded that, if the court had the jurisdiction to determine the question of whether a "protest" had been made

within the meaning of 43 U.S.C. sec. 1165, it would have concluded that the action of the Land Office on April 3, 1963, cancelling the entries, was a protest within the meaning of 43 U.S.C. sec. 1165 and the Government was not required to file a technical contest to stop the running of the two-year period concerned (R. 51).

II

IF THIS COURT FINDS THAT THE DISTRICT COURT HAS JURISDICTION, THE APPELLANTS MUST FIRST HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES TO INVOKE THAT JURISDICTION

A. Appellants have not exhausted their administrative remedies[3/]. - Assuming for purposes of argument only that the district court had jurisdiction, it is a well-established principle of law that no one is entitled to judicial relief until the prescribed administrative remedies have been exhausted. This requires not merely the initiation of efforts to secure administrative review but the pursuing of them to

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3/ The district court did not rule on this ground, in view of its finding of no jurisdiction (R. 51).

their conclusion in the administrative agency prior to seeking judicial intervention. Union Oil Company of California v. Federal Power Commission, 236 F.2d 816 (C.A. 5, 1956), cert. den., 352 U.S. 969 (1957); Coy v. Folsom, 228 F.2d 276 (C.A. 3, 1955); Davis v. Nelson, 329 F.2d 840 (C.A. 9, 1964).

The decision of the Assistant Solicitor, dated February 3, 1965, has remanded the subject cases to the Land Office for the express purpose of instituting a contest proceeding to resolve the factual issues involved. The administrative process in these cases will not be exhausted until a final and definitive decision is issued pursuant to evidence adduced at a hearing bearing on the reclamation accomplished. Appellants are simply trying to short-cut the administrative process, which can possibly lead to an award to them of the land they desire, without the necessity of court proceedings. The doctrine of exhaustion of administrative remedies is designed precisely for the purpose of preventing such possible useless endeavor by the court.

B. The decision of the Land Office of April 3, 1963, was not arbitrary in the sense that it would give the district

court jurisdiction. - In the first place, the decision of April 3, 1963, has been set aside by the Secretary and the case remanded. This action of the Secretary renders moot any suggestion that the action of the administrative agency was arbitrary and capricious, thereby giving the court a limited jurisdiction over this matter.

In the second place, the decision of the Land Office was not a final administrative decision. Any appeal taken from it to a court necessarily would be premature and subject to dismissal for failure to have exhausted an administrative remedy.

In this case, appellants appealed to the Secretary and succeeded in having the Land Office decision set aside. It cannot now be seriously urged that this action of the Land Office is arbitrary and capricious, so that a court can exercise its limited jurisdiction to review administrative actions to ascertain whether they are arbitrary or capricious.

The action of the Land Office, in fact, was not arbitrary when it "without notice and hearing" rendered its decisi

of April 3, 1963. That decision was made based on matters within the record before the Land Office which was considered sufficient to warrant the action taken. The Secretary concluded, however, differing with both the Land Office and the Bureau of Land Management, that there was a question of fact to be decided and a hearing required. The Secretary made no finding that the decision was arbitrary or capricious. The normal Land Office procedure is to treat matters in as expeditiously a manner as possible. Where matters of record would require an entry to be rejected and cancelled, no useful purpose would be served to have a contest and a hearing (R. 26-I). In this instance, the Secretary found that the issue was not one to be resolved by the record and ordered a contest be initiated to resolve a question of fact. Aside from the fact that the decision of the Secretary set aside the Land Office decision and that of the Bureau of Land Management, the Land Office decision was never shown to be arbitrary or capricious. All one can say is that the judgment of the Land Office as to whether a factual issue was present in the case differed with the Secretary's.

C. Appellants did not timely raise their claim to patents, regardless of the validity of their entries. - The appellants herein, after the Secretary of the Interior had remanded this controversy for the holding of a hearing as to contested factual questions, for the first time asserted the claim that the Secretary of the Interior was obliged to issue to them patents under 43 U.S.C. sec. 1165, without regard to those factual questions. The statute provided for the issuance of patents on the basis of the passage of time, regardless of whether there had been compliance with certain minimum requirements with respect to cultivation. The Land Office Manager, on March 5, 1965 (R. 26-P), responded to the appellants' demand (R. 26-O) for the immediate issuance of patents by stating:

> * * *, the Land Office decision of April 3, 1963 was a protest action that would toll the two year patent entitlement period, as it was taken within the two year period.
>
> Therefore, the entrymen are not entitled to patent on this premise.

The Manager then speculated that:

> It is assumed that this matter was reviewed by the Secretary when decision A-30201 was being considered. 4/

This request for patents under 43 U.S.C. sec. 1165 and the decision to not respond to appellants' demands was the first time in this proceeding that the question presented by this appeal had been raised. Notwithstanding speculation of the Manager of the Land Office, this matter was not ruled on or considered by the Secretary.

This adverse decision of the Land Office has now become a final administrative action and the failure of appellants to perfect an appeal to the Director and the Secretary precludes them from raising for the first time this issue in the courts.

This Court in Davis v. Nelson, 329 F.2d 840 (1964), treated a similar situation at page 847, where it said:

> Procedural errors, no matter how serious, are subject to correction on administrative review equally with erroneous determinations of fact

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4/ It is clear that appellants' present approach would modify the Secretary's decision and the purpose of the reversal.

> and law after hearing. We cannot assume that improvident or illegal action by the manager would not be summarily reversed by the Director or Secretary. Plaintiffs first must follow the course of administrative procedure to finality before appealing to the courts for relief. Myers v. Bethlehem Shipbuilding Corp. (1938), 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638; Brown v. Hitchcock (1899), 173 U.S. 473, 19 S.Ct. 485, 43 L.Ed. 772; Interstate Natural Gas Co. v. Southern California Gas Co. (9 CCA 1953), 209 F.2d 380; Olinger v. Partridge (9 CCA 1952), 196 F.2d 986. This is so even if a claim of unconstitutionality is asserted against the administrative process. Monolith Portland Midwest Co. v. Reconstruction Finance Co. (9 CCA 1949), 178 F.2d 854; Aircraft & Diesel Equipment Corp. v. Hirsch (1947), 331 U.S. 752, 67 S.Ct. 1493, 91 L.Ed. 1796. The Administrative Procedure Act (5 U.S.C. § 1009) expressly provides that "any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action", and includes within the scope of judicial review of any "final agency action" power to set aside agency action taken "without observance of procedure required by law." The special issues presented by the Third Cause of Action of the Complaint fall before the requirement that plaintiffs must pursue and exhaust their administrative remedies to finality.

Accordingly, when the administrative remedies provided within the Department of the Interior are not fully pursued, it must be held that appellants are barred from any judicial review of this administrative action.

It is of no matter, that there was no statement at the end of the Manager's response to the demand that he issue patents to the appellants, which advised appellants of their right of appeal.

Appellants are well aware of the proper procedure to be followed in appealing from an adverse action. It may be noted also that appellants have the right of appeal from any adverse action not by virtue of the statement usually attached to the end of Interior decisions. It is provided in 43 C.F.R. sec. 1842.2 that any party adversely affected by a decision of an officer of the Bureau of Land Management shall have a right of appeal to the Director. Certainly the Director and the Secretary, not the Court, are the ones to whom appellants should go to ascertain what the Secretary earlier had decided. Instead, this suit was filed just a little more than two months after the Manager's response to their demand.

## CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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MAY 1966.

## CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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